(16,655)

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 154.

THE NORTHERN PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

JAMES DE LACEY,
DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

Comes now James DeLacy, the Defendant in Error, by his attorneys, Ballard & Norris, and W. H. Pritchard, Esq., of counsel, and calls attention of this Honorable Court to the questions involved in this proceeding in error.

First.

As to the issues made in the pleadings; this cause originally was a simple suit in ejectment, under the laws of the State of Washington, in the Circuit Court of the United States, 9th Circuit, holding terms at Tacoma, Washington, commenced by the plaintiff in error, the plaintiff below, to recover possession of the following lands, to-wit:

The Southwest quarter of Northeast quarter; the Southeast quarter of Northwest quarter, and east half of the Southwest quarter, Section 21, Township 20 North, Range 3 Willamette Meridian, in the State of Washington.

Under an allegation of ownership from James De Lacey, the defendant in error, who was in possession, claiming homestead rights thereto, under the Homestead Law of the United States; no claim for damages. See Record, page 1.

To said complaint the defendant in error filed answer. See Record, page 4.

And denies ownership in the plaintiff, setting up the facts showing his right of possession.

To this answer the plaintiff filed motion to strike. See Record, page 12.

On argument and submission, Hon. C. H. Hanford, presiding Judge, overruled said motion in part, and defendant in error filed an amended answer.

To this amended answer plaintiff filed demurrer. See Record, page 25.

On argument and submission, Hon. C. H. Hanford, presiding Judge, overruled said demurrer. See Record, page 26.

Thereupon, the plaintiff filed a reply to said answer, joining issue on the facts, see Record, page 27, and the issue thus presented was set down for trial.

Afterwards, to-wit, on the 10th day of July, 1894, said cause was tried before Honorable W. B. Gilbert, Judge of said Court, presiding, and by written stipulation a jury was waived and trial had to the Court. See Record, pages 29 and 30.

That afterwards, on the 13th day of September, 1894, there was filed in said cause the opinion of the

Hon. W. B. Gilbert, Judge of said Court. See Record, page 30.

That afterwards, on the 6th day of October, 1894, the Honorable Trial Court made and filed in Court a full and complete finding of facts. See Record, page 36.

On the same day the Honorable Trial Court made and filed his conclusions of law. See Record, page 41.

Thereupon the defendant filed his motion to set aside the finding of facts, conclusions of law and judgment, see Record, page 42, and on November 28, 1894, said Court overruled said motion for new trial, and entered final judgment. See Record, page 45.

Thereupon, and within six months from the entering of said judgment, the defendant appealed said cause to the Honorable United States Circuit Court of Appeals, Ninth Circuit, holding terms at San Francisco, California, which appeal was argued and submitted at the October term, 1895, of said Appellate Court.

Afterwards, to-wit, on the 6th day of February, 1896, said Court filed in said cause the opinion of said Court, and judgment reversing the Trial Court, settling every issue in the case, directing further proceedings not inconsistent with the said opinion and mandate filed in said U. S. Circuit Court, February 25, 1896. See Record, page 46. Said cause fully reported in Vol. 72, Fed. Rep., page 726.

From said judgment of said Honorable Circuit Court of Appeals, no appeal, writ of error or review was taken, to this Honorable Court, notwithstanding provision is made for such proceeding in section 6 of the act creating the Circuit Court of Appeals; see Act of Congress, Vol. 1, Supplement to Revised Statutes of the United States, pages 901-904, and more than one

year has elapsed since the entering of said judgment, and the filing of said opinion, February 6, 1896.

That subsequent to the entry of said judgment, under the rules of said Court, the mandate of said Court issued to the Honorable Trial Court for further proceedings, not inconsistent with the opinion filed; and on motion of defendant, with due notice to the plaintiffs, and on the 28th day of May, 1896, the Honorable Trial Court, against the verbal protest of the plaintiff, entered judgment in strict compliance to the said mandate. See Record, page 50.

From the overruling of plaintiff's verbal protest, and the entering of the final judgment by said Trial Court, the plaintiff excepted. See Bill of Exceptions, Record, page 52, as follows:

1st. "That said plaintiffs were, under the mandate of said U. S. Circuit Court of Appeals, entitled to a new trial in said action for the purpose of showing the facts necessary to establish that the Northern Pacific Railway Company had good title in fee to the land described in the complaint."

2d. "That the judgment which was presented to the court for signature, together with said motion, was in part a decree in equity, in that it decreed that the patent issued to the Northern Pacific Railway Company for the land described in the complaint herein, which said patent is dated December 13, 1892, is null and void."

Subsequently the plaintiff took a second appeal, or writ of error, to the United States Circuit Court of Appeals, Ninth Circuit, and made and filed an assignment of errors, as follows: See Record, page 54.

1st. "The said court overruled plaintiff's demur-

rer to the affirmative defense in the defendant's answer herein."

This assignment of error was frivolous and for delay only, no such question was before the court at the time, no such question was presented to the court, nor passed on by the court, and no bill of exceptions taken and signed by the court, covering any such proposition. In fact the said demurrer was overruled February 12, 1894, see Record, page 26, and plaintiff waived the demurrer, filed reply, joined issue on the facts, and went to trial, and the question of overruling said demurrer was not presented nor insisted upon on the first appeal, and it comes too late now.

We cite:

U. S. vs. Blackfeather, Vol. 15, Sup. Ct. Rep., 63.

Second error assigned: "The said court refused to order a new trial and entered judgment without the intervention of a jury, upon the defendant's motion."

This assigned error is based on the first exception. See bill of exceptions; and is frivolous, because no motion was ever made and filed for new trial, as set out in the bill of exceptions, and for the reason, if motion had been filed for a new trial the matter would be in the discretion of the court, and the overruling of same would not be an assignable error.

We cite in connection:

Van Stone vs. Stilwell, 12 Sup. Ct. Rep., 181.
Hickman vs. Fort Scott, 12 Sup. Ct. Rep., 9.
Holder vs. U. S., 14 Sup. Ct. Rep., 10.
Moore vs. U. S., 14 Sup. Ct. Rep., 26.
Latta Exr. vs. Granger, 17 Sup. Ct. Rep., 746.

Third error assigned: "The said judgment grants to the defendant equitable relief, in that it decrees that the patent issued to the said Northern Pacific Railway Company for the land described in the complaint herein, which said patent is dated December 13, 1892, is null and void."

This error assigned is based on the second cause mentioned in the bill of exceptions. See Record, page 53. That exception was not taken to the judgment as entered by the court, but says to, "the judgment which was presented to the court for signature, together with said motion." See Record, page 53. No exception was taken to the judgment entered by the court, at least, there was no bill of exceptions showing it.

This error assigned is frivolous for the reason, no relief in equity, or otherwise was granted the defendant, see Record, page 51; simply a judgment at law declaring the patent void because issued without authority of law; and in favor of the defendant for costs.

The law of the case was determined by the Honorable Circuit Court of Appeals. See Record, page 46. Also see case fully reported in 72 Fed. Rep., page 726. No appeal, writ of error or review was taken from that judgment, and that opinion remains the law of this case. The judgment is strictly in accordance with the opinion and mandate, no other could have been entered, and as we believe is sustained by former opinions of this honorable Court.

We cite:

Van Wyck vs. Knevals, 1st Sup. Ct. Rep., 336.

Railway Co. vs. Dunmeyer, 113 U. S., 629. (5th Sup. Ct. Rep., 566).

Bardon vs. Railroad Co., 145 U. S., 535. (12th Sup. Ct. Rep., 856).

Land Co. vs. Griffey, 143 U. S., 32. (12th Sup. Ct. Rep., 362).

Fourth error assigned: "The court failed and refused to hold that the patent of the United States issued to the plaintiff December 13, 1892, conveyed to said plaintiff the legal title to the land in controversy, and that plaintiffs are entitled to recover in this action."

This error assigned is not saved by any bill of exceptions; no such proposition was submitted to, or passed on by the trial court at that time; and it is frivolous in view of the opinion and mandate of the appellate court, where the findings of fact were considered, and the law determined adverse to the plaintiff. It must be frivolous to assign such an error in this cause and insist upon it in this Court.

Fifth error assigned: "The court entered a judgment not sustained by the findings of fact."

No such question was at that time before the court. The appellate court passed on that proposition on the first appeal, and under the mandate the trial court could enter no other judgment; no such question was presented, and no bill of exceptions taken or signed, saving such question.

Sixth error assigned: "The said court failed and declined to hold that the Northern Pacific Railway Company is the owner of, and that plaintiffs are entitled to the possession of the land in controversy."

The trial court so held on the trial. On defendant's appeal, the honorable United States Circuit Court of Appeals reversed that judgment, and it was not error for the trial court under the mandate to *decline to so*

hold. And it is frivolous to assign such error. On the re-appeal of said cause by this plaintiff in error, the honorable appellate court, with bill of exceptions and the errors assigned as aforesaid before it, affirmed the judgment, and, we think, committed no error. The appellate court filed no opinion and we see nothing left for this Honorable Court but to affirm the judgment of the appellate court, from which this proceeding in error comes.

The lower court, under the mandate had nothing to do except enter the judgment in accord with the mandate, and having so entered the judgment, no appeal would lie.

We cite:

Ex parte, Washington & G. R. Co., 11 Sup. Ct. Rep., 673.
Gaines vs. Caldwell, Judge, 13 Sup. Ct. Rep., 611.
Cook vs. Bumley, 11 Wall, 677.
Stewart vs. Salmon, 97 U. S., 361.
Humphrey vs. Baker, 103 U. S., 736.
Kantz vs. Rio Grande R. R., 32 L. A. R., 826.

On a re-appeal or second appeal, the only matter that could be brought, or that was properly before the appellate court for review, was the proceeding of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question of law or fact before the court, by previous appeal.

We cite:

Balch vs. Hass, C. C. A., 8 Circuit, reported in 73 Fed. Report, 974.

We take it the practice in this Honorable Court will be substantially the same. If the appellate court committed no error in affirming the judgment under the mandate, then this Court will affirm that judgment.

The Honorable Court, please, we understand the practice in this Court to be that this Court can only be called upon to consider such assigned errors as were pressed upon the attention or notice in the opinion of the court below. And we cite the recent case, October 27, 1896, of "Old Jordan Mining and Milling Co. vs. Socite Anonyme De Mines De Lexington, 164 U.S., 261.

Where the court says, see opinion: "We have repeatedly held that the failure to present and insist upon errors assigned in the court below, constitutes an abandonment or waiver of all errors, so assigned, not vital to the question of jurisdiction or the foundation of the right; and this court can only be called upon to consider the errors pressed upon the attention or notice in the opinion of the court below."

Cited:

Montana R. Co. vs. Warren, 137 U. S., 351.

San Pedro Acda Co. vs. U. S., 146 U. S., 136.

All the questions that could be presented to the Honorable Circuit Court of Appeals, on the re-appeal from which judgment this error comes, is the question saved and presented by the bill of exception. See Record, pages 52, 54.

And the only question thus presented is:

First. The question of overruling protest, and failure to grant new trial, that being a question not reviewable, not assignable as error, and not being reviewable in appellate court, it will not be reviewed by this Court.

The only other question saved by this bill of exception and presented to the appellate court (see Record, page 53) is—

Second. That covers a "judgment presented to the court for signature together with said motion," and not any judgment entered by the court; and as the appellate court did not consider the same, and there being nothing in the Record to show that it was insisted upon, and there being no opinion filed showing what matter was presented or insisted upon, other than this defendant's motion to dismiss, and the honorable court simply overruled said motion and affirmed said judgment, we see nothing for this Honorable Court to review.

If the errors that the plaintiff in error complains of were committed it was done by the Honorable United States Circuit Court of Appeals in the opinion and judgment on first appeal, which opinion and judgment was FILED ON THE 6TH DAY OF FEBRUARY, 1896.

No motion was made in that court for review; no appeal, writ of error or review was taken within one year as provided by law, and not at all to this Honorable Court, and under the rule announced in case cited supra "Old Jordan Mining Co.," 164 U. S., 261, we take it this constitutes an "abandonment or waiver of all errors," and the judgment of the Honorable Circuit Court of Appeals must stand as the law of this case, and should be affirmed by this Court.

This Honorable Court, please, we will call attention to the merits of this controversy, so that it will be known that we are not stickling for technical advantage, but have real merits in our contention; and will say in advance, that in our opinion every question af-

fecting the claim of the plaintiff to the land in controversy has been fully determined by the previous opinion and judgment of this Honorable Court.

FIRST, PLEADING.

In the defendant's answer, see 6th paragraph, Record, page 22, the defendant avers "that the map of definite location, general route of main line of said plaintiff railroad was filed July 30, 1870, and an order of withdrawal issued by the land department of the United States as provided in said grant, on August 13, 1870, at which time the pre-emption filing of said John Flett, D. S. 1227 aforesaid, was a valid pre-emption filing upon said land as hereinbefore described, as shown by the records, books and plats of the General Land Office of the United States, to which books, records and plats reference is here made, and said pre-emption filing aforesaid was then legal, valid, uncancelled pre-emption claim to said land, and defendant avers such filing and claim excepted said land from the operation of said grant."

The plaintiff filed a reply to that paragraph of said answer, as follows: "Denies the same, except the allegation in said paragraph that the map of general route of plaintiff's main line of railroad was filed on July 30, 1870, and that an order of withdrawal was issued by the land department of the United States, on August 13, 1870, as provided in the grant to plaintiff as alleged in said paragraph, which allegation said plaintiff admits. See Record, page 28.

In the 7th paragraph of plaintiff's reply the plaintiff avers "said plaintiff admits that the lands in controversy are within the limits of the grant to plaintiff on

main line of plaintiff's railroad as definitely located and fixed under and by virtue of the act of Congress of July 2, 1864, and the acts amendatory thereof, and said plaintiff admits that the defendant is in possession of said lands. See Record, page 28.

Thus the averment of the answer and the admission in the reply thereto, fixes the definite time when the map of route and withdrawal under the grant took effect, and the further fact that the land in controversy is within the limits of the grant, and withdrawal on main line of plaintiff's railroad via the valley of the Columbia river to Puget Sound, that being the main line so fixed by the amendatory act of May 31, 1870, cited Vol. 16, supplement to the revised United States Statute, pages 378 and 379. The issue thus fixed and settled in the pleadings, was the issue and only issue before the trial court on that subject, and to that issue so made in the pleadings the testimony of the plaintiff and the defendant was introduced. The plaintiff introduced the patent dated December 13, 1892, for the land in controversy, and this patent recites the fact that it is issued in pursuance to the act of July 2, 1864, as amended by act, May 31, 1870, on the main line via the valley of the Columbia river to Puget Sound. There was no averment in the pleadings that the land was within the limits of any other grant, or on any other main or branch line of plaintiff's railroad.

In this connection we will call attention to the law of Congress under which the plaintiff must recover, if at all. Under the original grant, July 2, 1864, plaintiff was granted every alternate odd numbered section of land for 20 miles on each side of the main and branch line of railroad, substantially from Duluth to Puget Sound, across the then territory of Washington, the

main line to Puget Sound and a branch line from some point on main line to a point at or near Portland, Oregon, to which a homestead or pre-emption claim had not attached at the time of the filing a plat or map of the survey of such line, in the land department. So that, under the original grant and the allegations and admissions of the pleadings, said grant attached to the lands in controversy on July 30, 1870, at least on August 13, 1870, when the withdrawal was issued as provided in the act, unless at that date the land was covered by the John Flett D. S. 1227, and the record at that time shows it to be uncancelled. And if at that time, August 13, 1870, the record in the land office showed this John Flett pre-emption uncancelled, that settled the question, and under the terms of the grant this land was excluded from the grant, and said company was entitled to select other land in lieu thereof.

The honorable trial court in the 4th finding, see Record. page 38, finds that the map on the main line was filed July 30, 1870, and order of withdrawal issued August 13, 1870.

The honorable trial court found in his 12th finding that on April 9, 1869, John Flett filed his D. S. 1227, declaring his intention to purchase the land in controversy. See Record, page 39.

In his 13th finding, see Record, page 40, found that in September, 1870, Flett went to the land office to make final proof. And in the 19th finding, see Record, page 41, the court finds that "Flett's declaratory statement was not formally cancelled upon the record until December 23, 1891." The law is: "That the cancellation of the entry takes effect as of the date when the decision was in fact rendered."

And we cite:

Henderson vs. N. P. R. Co., 7 L. D., 163, opinion of Hon. Secretary of the Interior, Vilas.

These facts, with the law laid down by this Court in the Dunmeyer case should have settled this case against plaintiff in the trial court. But not so. See Kansas Pacific Ry. Co. vs. Dunmeyer, 5 Sup. Ct. Rep., 566, supra.

Subsequent to April 9, 1869, Congress (at the request of plaintiff company) passed a joint resolution, No. 20, "Extending its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound to be determined by the said company."

Later Congress passed Resolution No. 67, "And also to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the Columbia river; with right to locate and construct its branch from some convenient point on its main trunk line, across the Cascade mountains to Puget Sound." Resolution approved May 31, 1870. See U. S. Statutes at Large, Vol. 16, page 378, 379. This act was passed one year and twenty-two days subsequent to the John Flett pre-emption on the land in controversy.

This resolution reserves from the grant all lands in any manner disposed of by the government subsequent to the grant of July 1, 1864.

The plaintiff company accepted this new grant, and under it surveyed and platted its main and branch lines, and completed said road on main and branch lines prior to January 1, 1885.

By this joint resolution, Congress in effect repealed the original grant of 1864, so far as it applied to land within the territory of Washington, or substituted a new grant for the territory of Washington. For the first time plaintiff was by law authorized to build the main trunk line via the valley of the Columbia river to Puget Sound; and for the first time had the right given said company to establish and construct its branch line across the Cascade mountains to Puget Sound.

We cite:

United States vs. Northern Pacific R. Co., 152 U. S., 284 (14 Sup. Ct. Rep., 598),

Where this Honorable Court says:

"For the first time by joint resolution of May 31, 1870, whereby it is authorized with all the privileges and grants of the original act; to locate and construct its branch line to some point on its main line across the Cascade mountains to Puget Sound."

And we might add, for the first time took any interest in government lands on the main trunk line, and the Cascade or branch line in the now State of Washington, and that all land in the State of Washington to which a homestead or pre-emption claim had attached May 31, 1870, was excluded from the grant; and this John Flett D. S. 1227, April 9, 1869, being of record in the land office on May 31, 1870, was excluded from the grant, and by the terms of the grant plaintiff company at once became entitled to select other lands in lieu thereof.

We cite:

Railway Co. vs. Dunmeyer, 113 U. S., 629.
Bardon vs. Railroad, 145 U. S., 535.
Land Co. vs. Griffey, 143 U. S., 32.

The Honorable Court, please, we now call attention to the findings of facts of the honorable trial court.

First, Finding No. 4, Record, page 38; map of definite location filed in the General Land Office, August 13, 1870.

Finding No. 12, Record, page 39; John Flett filed D. S. 1227, covering the land in controversy, April 9, 1869.

Finding No. 13, Record, page 40, where the court is inclined to raise a doubt as to John Flett being a legal pre-emptor. As to this, we say this question can not be raided or urged by the railroad company in aid of the grant. And this is so well settled in this court, we need not cite authorities.

The land department recognized John Flett as a legal pre-emptor, and the honorable trial court in his opinion in this case, 66 Fed. Rep., on page 451, says: "And if the title in controversy in this suit were to be determined by the rights which the company acquire under the joint resolution, only, the decision must be for the defendant, for it is clear that at, and prior to the date of the joint resolution, there was upon file in the local land office a valid and subsisting pre-emption entry, being unforfeited and uncancelled, operated to except the land from the grant."

The fifth, sixth, seventh, eighth, ninth, tenth and eleventh findings, see Record, page 38, are immaterial under the pleadings and other facts of this case. Immaterial for the reason that at and during all the time when subsequent maps of location were filed, they were subsequent to the original map of definite location, July 30, 1870.

See 4th finding, Record, page 38. The land in controversy was covered by the John Flett pre-emp-

tion D. S. 1227, and being contested as found by the trial court, see findings, 12, 13, 16 and 17, and Record, pages 39, 40. And the honorable trial court found as a fact material under the pleadings, that the Flett declaratory statement was not formally cancelled upon the records until December 23, 1891; see Record, page 41. And under the decision of this Honorable Court in Whitney vs. Taylor, 158 U. S., 85, we assume that this has settled every material question in this case adversely to the claim of the plaintiff herein. We rely upon that decision of this Court as fixing the law of this case, and it is in harmony with all former opinions of this Court, and we can only wonder that counsel for plaintiff in error (the N. P. Ry. Co.) so continually and persistently contest the rights of this an honest homesteader before this Honorable Court.

This Honorable Court has repeatedly held that a railroad company claiming a land grant can not do these things; can not contest the rights of a homestead or pre-emption claimant. So often have these questions been before this Honorable Court that counsel for defendant in error feel like apoligizing to this Court for presenting an argument as to the matters brought by this proceeding in error.

We might cite from the decisions of the land department to show that the land department of the government is in harmony with the Court.

We cite:

Milligan vs. N. P. R. R. Co., 7 L. D., 85.

Where the Honorable Secretary of the Interior says:

"A pre-emption filing of record which has attached at the date of withdrawal on general route, and when the line was definitely fixed, excepts the land covered

thereby from the operation of the grant, and the railroad company can not question the validity of such filing."

We cite also:

7 L. D., pages 14, 85, 131, 238, 352.
10 L. D., 246, 288, 386, 427, 645, 662, 307.
All of these N. P. R. R. cases.

We cite:

Michael Orr vs. C. P. R. R. Co., March 20, 1891, Vol. —, L. D., page —.

In that case the land was within the limits of the grant to the railroad company. Pre-emption filed June 15, 1856, by W. B. Wilson. After definite location of the line of the railroad, January 25, 1877, Orr made application to file homestead entry, and the same was rejected, the railroad company contesting. Orr claimed that the filing excluded the land from the grant, and Wilson's right being forfeited by his failure to make proof, Orr's application should be allowed to stand for the land. This cause is on all-fours with the case at bar. On appeal to the Honorable Secretary of the Interior, the Hon. John W. Noble, he says:

"The pre-emption of Wilson being a valid claim subsisting at the date of definite location excepted the tract from the operation of the grant, and the application of Orr was, therefore, erroneously rejected."

There are other questions that we desire to call the attention of this Honorable Court to:

First. We call attention to the proposition of the honorable trial court, that while the land in controversy was excluded by operation of law from the grant of 1864, as amended by resolution of May 31, 1870, never-

theless, the grant on the branch line of 1864 covered the land and attached to it by reason of the filing of the map of the line from Tacoma to South Prairie in 1884. See tenth finding, Record, page 39. And carried the title to this land to the plaintiff company, notwithstanding the issues in the pleadings and admissions of the plaintiff in their reply. See paragraphs 6 and 7, Record, page 28.

And notwithstanding the recitals in the patent, and notwithstanding the opinions of this Honorable Court in the cases heretofore cited.

While we say the honorable trial court, to reach that determination, went outside of any pleading, outside of any issue in the case made by the pleadings, and so found.

We cite, and call attention to the opinion of the honorable trial court in this cause, 66 Fed. Rep., 450. At page 451 the court says: "And if the title in controversy in this suit were to be determined by the right which the railroad company acquired under the joint resolution only, the decision must be for the defendant, for it is clear that at, and prior, to the date of the joint resolution, there was upon file in the local land office a valid and subsisting pre-emption upon the land in controversy, which entry being unforfeited and uncancelled operated to except the land from the grant."

And the court cites:

R. R. Co. vs. Dunmeyer, 113 U. S., 629.
Bardon vs. R. R. Co., 146 U. S., 535.
Land Co. vs. Griffey, 143 U. S., 32.

And the honorable trial court in his 19th finding, see Record, page 41, found Flett's declaratory state-

ment was not formally cancelled upon the record until December 23, 1891.

Defendant's counsel in arguing his motion for a new trial in the court below, insisted that on the main line, under the resolution of May 31, 1870, this land was excluded from the grant of 1864, as amended May 31, 1870, just as the court determined, and asked to be informed how, when, and by what authority the same was subsequently restored, or returned to the grant, so as to make it effective, and convey the title to the land on filing the map on branch line in 1884, fourteen years after it was excluded from the grant. That has never been answered to the satisfaction of the counsel for defendant by the honorable court.

Not yet content, the honorable court in his opinion, same page, says: "If there was no information before the court concerning the pre-emption claim other than the entry in the land office a different case would be presented; but the defendant alleges in his answer, abandonment of the land by Flett in 1871 and a forfeiture of all his rights under the pre-emption entry." (See opinion, page 453, 66 Fed.) "But here it is not only admitted by both the parties to the action that Flett abandoned and forfeited his claim in 1871, but the very right of the defendant to possess and claim the land is predicated upon such abandonment by Flett, and the extinction of Flett's claim. Such an admission must be held to destroy the effect and force of the entry in the land office."

Will the Honorable Court pardon the writer of this brief for smiling? He has been in the practice of law since 1858, and for the first time learned that at law, the admission of James DeLacey in this suit, to which neither the United States nor John Flett were parties, made

in court in the State of Washington in 1893, and assented to by the attorney for the Northern Pacific Railroad Company, has the "force and effect of destroying the entry in the land office." Plaintiff and defendant have been contesting the Flett pre-emption claim persistently since 1886, and this admission in the pleadings could not have the force and effect to destroy this entry in the land office.

Under the law and the records in the local and general land offices, plaintiff could never get the land, for the reason that from the facts as they exist in truth, and as found by the honorable trial court, the land was excluded from the grant, and the plaintiff was entitled to select other lands in lieu thereof.

But way down in 1892-3, DeLacey, in the suit of the Northern Pacific Railroad Co. against him for the possession of the land, avers that John Flett had forfeited all his rights under the pre-emption in 1871, and said company, the other contestant, admits the averment. Ergo, change: The railroad company gets the land, and the homesteader, James DeLacey, loses all his labor and valuable improvements made on the land since 1886, and the land as well, which land the trial court found to be of the value of $100,000.00. Had DeLacey employed some attorney instead of Ballard, one who had sufficient experience and knowledge of the law not to make such an admission, then this plaintiff could not have admitted the plea, and the records of the land office would stand, and the company lose the land. How uncertain is law. We are almost ready to say, as did the Honorable Circuit Court of Appeals, in this case on the first appeal: "We think this a mistaken quantity." See 72 Fed. Rep., 726.

Your Honors, please, the attorney who drew the original and amended answer herein, desires to call attention to the pleading and show that the admission found by the trial court, and on which his remarkable judgment was based (see opinion cited supra 66 Fed. Rep., 450) was not true in fact; no such admission was made. See paragraph 4 of amended answer, Record, page 22: "That said John Flett never having made final proof under said D. S. 1227, and never having resided upon or improved said land since 1871, forfeited all his right to make such final proof as required by law, and said pre-emption filing remained upon the records, books and plats of the General Land Office of the United States from said April 9, 1869, pending contest in local and general land offices of the United States until December 23, 1891, when the same was cancelled in fact and of record. All of which appears in the records of the General Land Office at Washington, D. C., and to which records reference is here made."

The honorable trial court should be fair in his findings.

On the re-appeal or second appeal of this cause by the plaintiff in error from the judgment entered under the mandate of the Circuit Court of Appeals, 9th circuit, the defendant in error filed his motion to dismiss the second appeal, because frivolous, and for delay; and we still think the motion should have been sustained. The motion was overruled and judgment affirmed February 8, 1896. We then thought and so argued that the judgment of said Honorable Circuit Court of Appeals rendered on February 6, 1896, reversing the trial court, was a determination of all the questions involved in the suit, and that all the plaint-

iff's rights had been adjudicated as shown by that opinion, and was a proper judgment and the final judgment from which an appeal, writ of error or review would lie to this Honorable Court. If anything was left to be done by the honorable trial court, except put the judgment in form and enforce it, then we are wrong. Otherwise the judgment of the said appellate court became the law of this case until that judgment was taken to this Court by appeal, error or review, and such an appeal must be taken in one (1) year from the filing of said opinion and entering judgment.

We cite:

T. P. R. R. Co. vs. May Gentry, 163 U. S., page 353, (16 Sup. Ct. Rep., 1104).

Bostwick vs. Brinkerhorf, 1 Sup. Ct. Rep., 15.

"Express Companies' Cases," 2 Sup. Ct. Rep., page 6.

St. Louis I. M. & S. Co. vs. Southern Ex. Co., 2 Sup. Ct. Rep., 6.

Lodge vs. Tweel, 135 U. S., 232 (10 Sup. Ct. Rep., 745).

McSourkey vs. R. R. Co., 146 U. S., 536 (13 Sup. Ct. Rep., 170).

In this last case cited the question is fully stated and confirms our view of the law.

We took no exception to the overruling of our motion, the court affirmed the judgment. We say now if the rights of the parties were determined in that opinion, and the judgment was entered according to the mandate, then the only question before the honorable appellate court on the second appeal, or error, was such questions as arose subsequent to the mandate;

and these questions only will be heard on this proceeding in error from the judgment of affirmance.

The Court will not re-examine anything that has been decided in a former appeal.

We cite:

Supervisors vs. Kennicutt, 94 U. S., 498, where the court (Chief Justice Waite) says: "For it is settled in this court that whatever has been decided here upon one appeal can not be re-examined in a subsequent appeal of same suit; such subsequent appeal brings up for consideration only the proceedings of the Circuit Court after the mandate."

Citing:

Martin vs. Hunter, 1 Wheat, 314.
Himley vs. Rose, 5 Cranch, 314.
Browder vs. McArthur, 7 Wheat, 58.
Sibbald vs. U. S., 12 Peters, 492.
Corning vs. Troy Iron Fac., 15 Howard, 466.
Sizer vs. Many, 16 Howard, 103.
Tyler vs. Maguire, 84 U. S., 15, 973.
In St. Bo. Lady Pike, 96 U. S., 461.

We insist that there is no error properly before this Court for review, touching any matter passed upon by the appellate court, for the reason that said appellate court passed upon the facts found by the trial court and determined the law, reversing the judgment, thus settling every question of law adversely to the plaintiff.

From that determination a right of review by this Honorable Court is provided for, as a legal right under Sec. 6 of the law of 1891, see Vol. 1, Supplement to Rev. Stats., page 903-4, and a failure to avail themselves of

that legal right, by the plaintiff, within one year from that determination must be a waiver or an abandonment of that right; and that judgment and opinion must stand as the law of this case, and no appeal will lie from the entry of the judgment under the mandate.

Aspen Min. & S. Co. vs. Billings, 14 Sup. Ct. Rep., 4.

Where the court says: "And no rule is better settled than that an appeal from a decree entered by the court below in accordance with the mandate of the appellate court can not be maintained."

Citing:

Stewart vs. Salmon, 97 U, S., 361.
Humphrey vs. Baker, 103 U. S., 736.
Railway Co. vs. Anderson, 147 U. S., 237.

If the Circuit Court of Appeals erred the appropriate remedy lay in certiorari.

Cite:

Amer. Con. Co. vs. Jacksonville Ry. Co., 13 Sup. Ct. Rep., 758.

Where the court says, that an appeal, writ of error or review is given as a right in cases not made final in C. C. A.

Notwithstanding this, the plaintiff in error now sues out a writ of error from this Honorable Court to the appellate court, from the judgment of affirmance of the judgment of the trial court under the mandate; and insists on this Honorable Court reviewing the whole case. If that can be, or will be done, then we mistake the purpose of the act creating the Circuit Court of Appeals.

We cite:

Ex parte Washington & G. R. R., 11 Sup. Ct. Rep., 673.

Gains et al vs. Caldwell, Judge, 13 Sup. Ct. Rep., 611.

Cone vs. Bumley, 11 Wall, 677.

Kantz vs. Rio Grand R. R. Co., 32 L. A. R., 826, Vol. —, U. S. Rep.

Your Honors, please, one of the questions contended for by plaintiff in error on the demurrer at the trial and in the appellate court was that the patent having issued, it was conclusive, that the validity or legality of the patent could not be questioned or attacked in this proceeding. We think the honorable trial court did not err in this regard.

We cite:

Burfening vs. St. P. M. & O. R. R. Co., 163 U. S., 321 (16 Sup. Ct. Rep., 1018).

Citing:

Johnson vs. Towsley, 80 U. S., 13.

St. Louis Smelt. & Ref. Co. vs. Kemp, 104 U. S., 636.

Steel vs. St. Louis Smelt. & Ref. Co., 106 U. S., 447.

Wright vs. Roseburry, 121 U. S., 488.

McCormide vs. Hayes, 159 U. S., 332.

And the court says: "But it is equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption or dedicated to any special purpose, proceeding in the land department in defiance of such reservation or dedication, although, culminating in a patent, transfers no title and may be challenged in an action at law."

We cite in addition:

Doolan vs. Carr, 125 U. S., 618.

Where the court says: "The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary."

Cites:

Poke vs. Wendall, 9th Cranch, 87.
New Orleans vs. U. S., 10 Peters, 730.
Wilcox vs. Jackson, 13 Peters, 509.
Stoddard vs. Chambers, 2d How., 317.
Easton vs. Salisbury, 21 How., 428.
Reichart vs. Felps, 6 Wall., 160.
Bast vs. Polk, 18 Wall., 117.
Railroad vs. U. S., 92 U. S., 733.
Newhall vs. Sanger, 92 U. S., 209.
Smelting Co. vs. Kemp, 104 U. S., 636.
Steel vs. Smelting Co., 106 U. S., 447.
Railroad vs. Dunmeyer, 113 U. S. 642.
Reynolds vs. Mining Co., 116 U. S., 689.
Davis vs. Wiebold, 139 U. S., 507.
Knight vs. U. S. Ass'n, 142 U. S., 161.
Morton vs. Nebraska, 88 Wall., 660.

The Honorable Court, please, this is not a case in ejectment at common law, but a case in ejectment or special proceedings in the nature of ejectment under section 531 of the law of the State of Washington. See Hill's Code of Washington, Vol. 2, page 287, as follows: 531. "The plaintiff in such actions should set forth in his complaint the nature of his estate, claim or title to the property and the defendant may set up a legal or equitable defence to plaintiff's claim."

The plaintiff alleged ownership and introduced his patent to prove legal title, and made no other claim to the land, and must stand or fall by that title.

The defendant is in possession, under his claim to the land under the homestead law, being a resident thereon with valuable improvements; see 15th finding, Record, page 40, and his right must be determined by the land department. See also 20th and 21st findings, Record, page 41; the trial court found the value of the land to be $100,000. See 21st finding, supra.

The Honorable Court will find the land to have been U. S. Government land April, 1869; that John Flett made pre-emption filing thereon April 9, 1869, D. S. 1227; that same remained of record under contest in the land department of the Government until December 23, 1891, when the same was cancelled by the only authority in this Government that could do so, the land department.

That the map of general route was filed July 30, 1870, and withdrawal issued by the land department August 13, 1870. And the map of definite route on branch line from Tacoma to South Prairie, on Cascade branch line, filed March 26, 1884, and said branch line was completed April 23, 1884, the land having been withdrawn in 1870, which fixed the time when plaintiff's interest under the grant was determined; no withdrawal was made by the land department on filing this map of branch line; with these facts and the law as laid down in the case of Whitney vs. Taylor, cited supra, 15th Sup. Ct. Rep., page 796, we certainly insist that the Honorable Circuit Court of Appeals was right in reversing the trial court, and in affirming the judgment of the trial court under the mandate on the second appeal; that the land in controversy is not and was

not conveyed by the grant to plaintiff company, and that plaintiff took no title thereto under the grant, and the patent issued December 13, 1892, to plaintiff void, and when the honorable court, under the direction of the mandate, entered the judgment declaring the patent void, the court committed no error.

We cite:

Hastings & D. R. Co. vs. Whitney, Vol. 10, Sup. Ct. Rep., 112.

Sioux City & I. F. T. & L. Co. vs. Griffey, 12 Sup. Ct. Rep., 362.

Dunmeyer case, 113 U. S., 629.

Bardon case, 145 U. S., 535.

Land Co. vs. Griffey, 143 U. S., 32.

Whitney vs. Taylor, 15 Sup. Ct. Rep., 796.

The Honorable Court, please, we are almost led to exclaim, "how long, oh, how long" will the courts of the country permit this rich railway corporation, who has received from the government a munificent bounty in land, worth many millions of money, be permitted to contest this homestead claimant in his efforts to get a home upon the public domain, and to prosecute this unfounded claim to the land in controversy, driving the claimant to the verge of bankruptcy, in the face of the facts and law, and in face of the fact that this railway company has no right in law to make contest of these homestead or pre-emption claims?

In the Whitney-Taylor case, also in former cases, this Court has informed the railway company on the subject. In that opinion they say, "a practice of allowing such contests would be fraught with the greatest danger to actual settlers, and would be subversive of

the principles upon which the munificent railway grants are based. As was said in the Dunmeyer case: 'It is not conceivable that Congress intended to place these parties (homestead and pre-emption claimants on the one hand and the railway company on the other) as contestants for the land, with the right in each to require proof from the other of complete performance of its obligations, least of all is it to be supposed that it was intended to raise up antagonism to all the actual settlers on the soil it has invited to its occupation, this great corporation with an interest to defeat their claims, and to come between them and the government, as to the performance of their obligations.'"

Notwithstanding such announcements by this Honorable Court since 1887, about which time the land in controversy became valuable by reason of the rapid growth of the city of Tacoma, on Puget Sound, the Sound terminus of the plaintiff's railroad, this rich railway corporation, this plaintiff in error, has been permitted to contest this Flett pre-emption, and the defendant's homestead claim through the local and General Land Office, and the Interior Department, and since 1892 through all the lower federal courts up to this Honorable Court of last resort; compelling an honest homestead claimant to bankrupt himself in order to obtain from the government land that was unoccupied government land when he presented his application to make homestead, at which time the records of the local and General Land Office showed this uncancelled claim of John Flett, this record and the law excluded the land from plaintiff's grant; and still they prosecute this matter to almost persecution, for the only purpose, in our opinion, of forcing this claimant to give up the fight, so they may hold the land under the patent is-

sued without anthority of law. Such things ought not to be.

We ask this Honorable Court to affirm the judgment of the Honorable United States Circuit Court of Appeals, and award the defendant in error judgment for his costs and disbursements for printing brief in this case.

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